

No. 21-15430

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ACA CONNECTS – AMERICA’S COMMUNICATIONS ASSOCIATION, et al.

Plaintiffs-Appellants,

vs.

ROB BONTA, * in his official capacity as Attorney General of California,

Defendant-Appellee,

BRIEF OF AMICI CURIAE COUNTY OF SANTA
CLARA, CALIFORNIA AND SIX ADDITIONAL
LOCAL GOVERNMENTS IN SUPPORT OF
DEFENDANT-APPELLEE

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae are governmental entities for whom no corporate disclosure is required.

Dated: May 11, 2021

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INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT¹

In a world increasingly dependent on near-instant communications over broadband Internet, local governments, including Amici, depend on their own and their residents' reliable and unimpaired Internet access to perform many of their core functions.² They have invested millions of dollars in modern, broadband-based communications systems, which they use for critical, time-sensitive, and information-intensive operations. Interference with these systems impairs—in profound, sometimes life-endangering ways—local governments' ability to respond to and recover from emergencies and natural disasters, conduct public health operations, provide healthcare, and perform effective law enforcement and other public safety functions. S.B. 822's net neutrality protections target one particularly harmful set of entirely avoidable practices that interfere with these systems and that are, as a result, of special importance to Amici.

Amici and their members, as local California jurisdictions, are responsible for protecting the health and wellbeing of tens of millions of Californians,

¹ All parties have consented to the filing of this amicus brief. No party's counsel authored this brief in whole or in part, and no person or entity other than Amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

² Amici are the County of Santa Clara, California; the Santa Clara County Central Fire Protection District ("Santa Clara Fire"); the City and County of San Francisco, California; and the Cities of Los Angeles, San José, and Oakland, California.

including by operating sheriffs’ offices, jails, police departments, emergency operations centers, public health departments, and health and hospital systems. Their investments in broadband-based communications systems to exchange information with the public underscore their reliance on a *neutral* Internet—that is, an Internet in which the public can reliably access critical information from the governments that serve and protect them. S.B. 822 protects the neutrality of the Internet by prohibiting Internet service providers (ISPs) providing mass-market broadband Internet access service (BIAS) from blocking, throttling, impairing, or degrading Internet traffic based on that traffic’s source or content, engaging in pay-to-play schemes such as paid prioritization (requiring payment for favorable treatment), or otherwise unreasonably interfering with lawful Internet traffic (the “Net Neutrality Conduct Rules”).³

The practices prohibited by the Net Neutrality Conduct Rules could hamstring or prevent local governments’ effective crisis response, community health and safety operations, and access to government by Californians at the moments they most need governmental services.

But even as government at all levels has come to increasingly rely on community members’ unimpaired access to the Internet to support public health

³ See Civ. Code §§ 3101(a)(1), (2), (3), (4), (7), 3101(b) (describing and prohibiting these practices).

and safety measures, the Federal Communications Commission abandoned its more than decade-long effort to police and ensure Internet openness.⁴ In late 2017, the FCC announced the termination of federal net neutrality protections and disavowed any federal authority to promulgate such rules.⁵

Recognizing that the State, local governments, and the residents they serve depend on a neutral Internet for public health, safety, and access to government, and further recognizing the risks posed by the FCC's curtailment of its own

⁴ See generally *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 693-96 (D.C. Cir. 2016) (discussing the history of FCC regulation of Internet openness).

⁵ The FCC terminated its net neutrality rules and disavowed regulatory authority over BIAS in its Restoring Internet Freedom Order. *Declaratory Ruling, Report and Order*, 33 FCC Rcd. 311 (2018) (the “2018 FCC Order”). Amici County of Santa Clara and Santa Clara Fire challenged the *2018 FCC Order*, amicus City and County of San Francisco and the California Public Utilities Commission intervened in that litigation, and amici Cities of Los Angeles, Oakland, and San José, along with the California State Association of Counties, were among the amici in that litigation. On October 1, 2019, the U.S. Court of Appeals for the District of Columbia Circuit agreed with the County of Santa Clara and Santa Clara Fire that the FCC had arbitrarily and capriciously failed to consider the *2018 FCC Order*'s effects on public safety, but nonetheless upheld termination of the net neutrality rules and remanded to the FCC with instructions to consider the public safety implications. *Mozilla Corp. v. FCC*, 940 F.3d 1, 93-100, 145-46 (D.C. Cir. 2019). On remand the FCC hewed to the *2018 FCC Order*, see *Order on Remand*, 35 FCC Rcd. 12328 (2020), in a decision that is now the subject of several petitions for reconsideration pending with the FCC, including one filed by the County of Santa Clara and Santa Clara Fire. See Petition for Reconsideration (Feb. 9, 2021), Docket Nos. WC 17-108, WC 17-287, WC 11-42, Filing No. 10209224471190, <https://perma.cc/94EX-2PF2>. The *Order on Remand* is also the subject of a petition for review that has been held in abeyance pending disposition of the petitions for reconsideration. See Order, *Cal. Public Utilities Comm'n v. FCC*, Dkt. No. 1893737, No. 21-1016 (D.C. Cir. Order filed Apr. 8, 2021).

authority, the California Legislature stepped in to fill the gap. Invoking the State’s police power, the Legislature passed S.B. 822 to, among other things, protect the health and safety of California communities by preventing interference with the critical public-safety and other services that local governments provide. The Legislature found that “[a]lmost every sector of California’s economy, democracy, and society is dependent on the open and neutral Internet,” including “[p]olice and emergency services,” “[h]ealth and safety services and infrastructure,” and “[g]overnment services, voting, and democratic decisionmaking processes.”⁶ It is no exaggeration to say that net neutrality saves lives.⁷

Amici’s reliance on an open and neutral Internet underscores both their interest in vindicating the public-safety concerns animating the Legislature’s enactment of S.B. 822, and the critical role that S.B. 822’s Net Neutrality Conduct Rules play in Amici’s exercise of the traditional police powers by which state and local governments protect and serve their residents.

ARGUMENT

I. Public Health and Safety Systems Throughout California Depend on a Neutral Internet

To fulfill their missions, local public safety agencies must communicate to, and receive information from, the residents they serve and protect. Timely

⁶ S.B. 822, 2017-2018 Reg. Sess. (Cal. 2018), § 1.

⁷ *See Mozilla*, 940 F.3d at 62.

communication with the public is central to effective emergency and public-safety management. And these agencies increasingly communicate with the public over the Internet. Governments themselves are frequently connected to the Internet through enterprise-grade or specially negotiated governmental access plans, and their public safety officials sometimes also use dedicated emergency response networks. But to protect public health and safety these agencies also operate as edge providers—that is, they produce and share content—and connect with outside entities, including community members.

So it is not enough for agencies themselves to have reliable Internet access. Instead, to advance their public-safety operations local governments rely heavily on *community members'* unimpaired access to broadband Internet on nondiscriminatory terms—precisely what S.B. 822 ensures. And community members largely access the Internet using the very services that the Net Neutrality Conduct Rules protect: mass-market broadband access “service[s] marketed and sold on a standardized basis to residential customers [and] small businesses,” and discounted programs for low-income and rural consumers.⁸ Without those rules, ISPs would be free to block or slow down public safety information—whether directly from governments or from third-party sites like social media platforms—and thereby prevent community members from learning how to stay safe in

⁸ Cal. Civ. Code § 3100(g), (n).

emergencies. As a result S.B. 822 advances public safety without regard to whether its Net Neutrality Conduct Rules apply to the services through which local governments themselves access the Internet.⁹

For example, first responders and other public health and safety personnel use a multitude of broadband-based methods to communicate and crowdsource vital information during emergencies and disaster recovery. They can leverage time-sensitive information from the public on a near-real-time basis: videos, photos, and text provided by the public can be used to establish situational awareness and advance investigations. And in turn they can alert the public to urgent and time-sensitive incident information, including evacuation or shelter-in-place orders¹⁰ and disease outbreak notifications. Public agencies and the residents they serve increasingly exchange information through third-party social media

⁹ One amicus contends that arguments about S.B. 822's effects on public safety are misdirected because local governments generally rely on enterprise-grade or bespoke governmental Internet access plans for *intragovernmental* communications. Br. of TechFreedom as Amicus Curiae, Dkt. 12, at 7-13. But this is irrelevant. S.B. 822 protects and advances public safety because public safety and health management requires communication over the Internet, and through private-sector edge providers, with community members who access the Internet through services governed by the Net Neutrality Conduct Rules.

¹⁰ See, e.g., Alameda County Fire (@AlamedaCoFire), Twitter (Sep. 7, 2018 4:24 pm), <https://twitter.com/AlamedaCoFire/status/1038206350923325442> (shelter-in-place order); Los Angeles Police Department (@LAPDHQ), Twitter (Oct. 22, 2018 4:46 pm), <https://twitter.com/LAPDHQ/status/1054519309777555456> (advising the public to avoid area of heavy police presence).

platforms.¹¹ This has been true for COVID-19-related orders and information—during a time when officials and residents alike have lived and worked at home—and also more broadly for police announcements during active shooter scenarios, adverse weather events, firefighter response, and other emergencies.¹² In fact, the U.S. Department of Homeland Security noted that relevant literature and real-world experience in nine different public safety emergencies made clear that real-

¹¹ See, e.g., U.S. National Library of Medicine, Disaster Information Management Research Center, *Social Media Analysis During Disasters* (last updated Feb. 2021), <https://perma.cc/C4RE-MXUQ> (emphasizing that both public safety agencies and the broader community rely on social media platforms to distribute and gather critical situational awareness information during emergencies); R. Moore & A. Verity, *Hashtag Standards for Emergencies*, United Nations Office for the Coordination of Humanitarian Affairs Policy and Studies Series (Oct. 2014), <https://perma.cc/DK38-44W5>; J. Bonnan-White et al., *Snow Tweets: Emergency Information Dissemination in a US County During 2014 Winter Storms*, PLoS Currents (Dec. 2014), <https://perma.cc/XDU5-6SXX> (analyzing public safety agencies' Twitter usage during adverse weather events and emphasizing that such agencies can use social media to disseminate critical real-time information during large events).

¹² See, e.g., Los Angeles Police Dep't (@LAPDHQ), Twitter Post (Apr. 8, 2020 7:48 p.m. PT), <https://twitter.com/LAPDHQ/status/1248080420505145344>, archived at <https://perma.cc/D26L-JAFS>; Boston Police Dep't (@bostonpolice), Twitter Post (Apr. 19, 2013 6:32 a.m. PT), <https://twitter.com/bostonpolice/status/325240385003732993>, archived at <https://perma.cc/7JRJ-5D62> (distributing photograph and information about Boston Marathon bombing suspect); Alameda County Fire (@AlamedaCoFire), Twitter Post (Sep. 7, 2018 4:24 pm PT), <https://twitter.com/AlamedaCoFire/status/1038206350923325442> (shelter-in-place order); Los Angeles Police Department (@LAPDHQ), Twitter Post (Oct. 22, 2018 4:46 pm PT), <https://twitter.com/LAPDHQ/status/1054519309777555456> (advising the public to avoid area of heavy police presence).

time two-way information exchange through social media plays a crucial role in emergency response. It concluded: “Through the use of social media, members of the public who witness incidents can provide public safety organizations with timely, geographic-based information. This information can be used by decision-makers in planning response strategies, deploying resources in the field, and, in turn, providing updated and accurate information to the public.”¹³

As described below, local governments rely on community members’ unimpaired Internet communications for functions as varied and critical as disaster response, public health operations, law enforcement operations, and telemedicine.

Disaster Response and Recovery, and Emergency Alerts. In all sorts of emergency circumstances—including not only the COVID-19 pandemic but also more localized emergencies like floods, fires, hospital outages, and mass shootings—local governments across California, from Humboldt and Sacramento Counties, to the County of Santa Clara and Cities of Los Angeles and Imperial activate virtual emergency operations centers to centralize and coordinate

¹³ U.S. Dep’t of Homeland Security, *Innovative Uses of Social Media in Emergency Management* (Sept. 2013), <https://perma.cc/WL3B-4JCP>; accord R. Merchant et al., *Integrating Social Media into Emergency-Preparedness Efforts*, *New England J. Med.* 2011; 365:289-291 (Jul. 28, 2011), <https://perma.cc/QQX6-JMF8>.

emergency response and disaster recovery.¹⁴ The County of Santa Clara, like many other jurisdictions, uses WebEOC as the lynchpin of its emergency coordination and management efforts. That system compiles vital information in emergency situations, permitting situational awareness during emergencies and response and recovery coordination.¹⁵ City and other on-the-ground personnel enter data on local conditions—for example, reporting fire boundaries, flooding, or injured individuals. Hospitals and other facilities with relevant resources enter their information—for example, the number of available beds. And County personnel use these data to obtain, allocate, and dispatch resources in near-real-time.

WebEOC’s information sources and recipients may be dispersed throughout the County—in the field, in public- and private-sector offices, and in their homes. For WebEOC to be effective, users must be able to access it regardless of the ISP through which they may be connected to the Internet at any given moment. Delays or failures to obtain the data at any step of the process could cause confusion and failure.¹⁶

¹⁴ See, e.g., Sacramento Cty. Office of Emergency Services, *About OES*, <https://perma.cc/P6QY-R43Y>; Orange Cty., *Emergency Operations Center*, <https://perma.cc/F8XP-JBJ8>.

¹⁵ See Cty. of Santa Clara, Emergency Management, *WebEOC*, <https://perma.cc/P5DT-Y966>.

¹⁶ Decl. of County of Santa Clara Chief Operating Officer Miguel Márquez in Support of Opposition to Preliminary Injunction Motions [“Márquez Decl.”], SER-46-61, at SER-49, ¶¶ 10-12.

Likewise, cities and counties across California—from Sacramento, to San Francisco, Alameda, Santa Clara, and other Bay Area counties, to the City of Los Angeles, to many others—depend on web-based public alert systems to notify the public of emergencies and disasters, to disseminate evacuation and shelter-in-place orders, and to share warnings about wildfires, unhealthy air quality, and excessive heat.¹⁷ Residents can register on the Internet to receive alerts through app- or web-based interfaces, and in some circumstances governments can push alerts to all residents. If ISPs were permitted to block, throttle, or degrade this Internet traffic, it would substantially impair local governments’ ability to inform and protect their residents.

Public Health Operations. Local governments, including Amici, also rely on the community’s access to the Internet to protect public health. During the COVID-19 pandemic, the County of Santa Clara’s Public Health Department has relied on community members’ access to both public-sector and private-sector edge provider content. Among other things, the department frequently updates its online COVID-19 Data Dashboard, which provides information about COVID-19

¹⁷ See, e.g., Cty. of Santa Clara Emergency Management, *AlertSCC*, <https://perma.cc/ZCR4-RK9M>; City & Cty. of San Francisco, Dep’t of Emergency Management, *Get City Alerts*, <https://perma.cc/7F2S-HX3K>.

vaccinations, testing, hospital resource usage, and other items.¹⁸ A month into the pandemic, the County Health Officer ordered residents and businesses to report to the County the personal protective equipment, like gowns and masks, they possess;¹⁹ the department used its website and another domain, research.net, to receive those reports.²⁰ The department has also used email, text messages, and social media to notify the public about the Health Officer's orders and information regarding testing and vaccinations for COVID-19. The County's Health Officer has briefed the public through Facebook Live and YouTube, and the County also distributes other critical and time-sensitive public-health information through these

¹⁸ See County of Santa Clara Public Health Department, *Coronavirus (COVID-19) Data Dashboard*, <https://www.sccgov.org/sites/covid19/Pages/dashboard.aspx> (last accessed May 11, 2021).

¹⁹ Order of the Health Officer of the County of Santa Clara regarding Personal Protective Equipment, <https://perma.cc/8BT5-5BF6> (Apr. 8, 2020).

²⁰ See Santa Clara County Health Officer Order to Gather Information on Local Supplies of Personal Equipment and Ventilators, <https://perma.cc/99LE-UFN4>; Santa Clara County Public Health One-Time PPE Inventory Survey, <https://perma.cc/4UH9-Z7JD>. Other public health departments around the country are using their websites similarly.

channels.²¹ Other local governments in California have taken similar steps.²²

But even before the COVID-19 pandemic, local public health departments relied on a neutral Internet in myriad ways. For instance, the County of Santa Clara Public Health Department gathers and monitors a large volume of syndromic surveillance data from area hospitals using the Internet. These data show trends in patients' symptom presentation that are examined by public health personnel in near-real time for indications of disease outbreak.²³ And in some circumstances, local public health departments use Internet-based systems to activate an ecosystem of health care providers to assist with public health operations. In recent years the County of Santa Clara Public Health Department has used MailChimp to distribute guidance and directives to healthcare providers, particularly public health emergencies. This system has replaced a fax-based system that took a day

²¹ See County of Santa Clara Public Health Department Facebook Page, <https://www.facebook.com/sccpublichealth> (last accessed May 11, 2021); County of Santa Clara Public Health Department YouTube Channel, <https://www.youtube.com/user/SCCPublicHealth>; see, e.g., County of Santa Clara Public Health Department, "County of Santa Clara Public Health Issues Guidance on Face Covering | 2020-04-17," <https://www.facebook.com/sccpublichealth/videos/281155356211105> (last accessed May 11, 2021).

²² See, e.g., County of Los Angeles, Facebook Live Event (April 17, 2020), <https://www.facebook.com/countyofla/videos/540375753340786>; County of Los Angeles Public Health Department, LA County Daily COVID-19 Data, <http://publichealth.lacounty.gov/media/Coronavirus/data/index.htm>

²³ Márquez Decl., SER-52-53, at ¶¶ 21-22.

and a half to distribute alerts.²⁴ For this Internet-based system to be effective, the department relies on a neutral Internet to be confident that health care providers and other partners can timely receive and act upon the information it shares.

Law Enforcement. Law enforcement agencies throughout the State post photos and videos of maps, criminal suspects, and missing individuals to solicit information from the public, and they use the public's responses in investigations. For example, just as the Legislature was debating S.B. 822, the County of Santa Clara Sheriff's Office posted a request on Twitter for the public's help in locating a sex offender, posting a photograph and description of the individual.²⁵ The message was retweeted 193 times.²⁶ The individual was arrested in less than 24 hours, and the Sheriff credited the community response with his successful apprehension.²⁷ Law enforcement throughout the State also re-post urgent information from other agencies to broaden the viewing population and increase the likelihood of this sort of outcome. Broadband connections also enable some agencies, including the County of Santa Clara Sheriff's Office, to obtain live-streamed or uploaded footage from home video cameras to assist in investigation

²⁴ Márquez Decl., SER-51, at ¶¶ 18-19.

²⁵ Santa Clara County Sheriff's Office (@SCCSOSheriff), Twitter (Aug. 29, 2018 5:24 pm PT), <https://twitter.com/SCCoSheriff/status/1034959899816591361>.

²⁶ *Id.*

²⁷ Santa Clara County Sheriff's Office (@SCCSOSheriff), Twitter (Aug. 30 2018 9:51 am PT), <https://twitter.com/SCCoSheriff/status/1035208449955528704>.

and emergency response.²⁸

Telemedicine. Community members' access to open Internet through mass-market retail broadband Internet is also essential to ensure that individuals can access healthcare without risks to the health and safety of the community at large. Telehealth is a high-bandwidth, low-latency application, and it relies on individual patients' access to an open Internet through their mass-market BIAS plans.

The need for residents to stay home during the COVID-19 pandemic underscores how essential telemedicine has become. For example, the San Francisco Department of Public Health (SFDPH) has relied on reliable retail broadband service to provide telemedicine to ambulatory care patients and to establish field clinics. Likewise, SFDPH was able to rapidly deploy medical clinics and isolation shelters to reduce the spread of COVID-19, relying upon mobile Wi-Fi hotspot devices to establish high-speed connectivity in remote locations with minimal setup.²⁹

But telemedicine's importance predates and will outlast the pandemic. For several years Santa Clara County's health and hospital system has invested heavily in telemedicine and electronic medical records systems, including to provide

²⁸ Márquez Decl., SER-57, at ¶ 37.

²⁹ Decl. of Mayor London N. Breed in Support of Opposition to Preliminary Injunction Motions, SER-62-66, at SER-64, ¶¶ 7-8.

healthcare over high-definition video connection with patients. Telehealth permits clinicians to connect with, diagnose, and treat patients through a broadband connection; to triage the most critical situations and improve outcomes, including in time-sensitive situations (such as strokes or vehicular accidents) where immediate diagnosis can literally mean life or death; and to avoid high-risk situations such as in-person treatment of jail inmates.

II. S.B. 822’s Net Neutrality Conduct Rules Prevent Irreparable Harm to Public Health and Safety

None of the systems or operations that local governments use to manage and respond to emergencies and manage public health and safety can work if residents—including officials working from home—cannot access them. But that is precisely what has happened when ISPs providing broadband Internet through mass-market plans have blocked, throttled, or otherwise impaired or degraded their access to the platforms on which they can exchange crucial, time-sensitive public safety information with their governments during emergencies. It is no exaggeration to say that when an ISP blocks or deprioritizes residents’ access to these platforms, “lives are at stake.”³⁰

This public safety risk is precisely what the FCC failed to understand when it terminated federal net neutrality protections in 2017—a decision that spurred the

³⁰ *Mozilla*, 940 F.3d at 62.

California Legislature to fill the gap with S.B. 822.³¹ Indeed, the D.C. Circuit has since held that the FCC acted unlawfully by failing to consider how terminating net neutrality protections would impact public safety.³² In reaching that conclusion, that court of appeals recognized that any blocking or throttling of Internet communications between governments and residents during a public safety crisis could have “dire, irreversible results.”³³ More specifically, “the harms from blocking and throttling during a public safety emergency are irreparable. People could be injured or die.”³⁴

After the FCC’s abdication, S.B. 822 is the only line of defense against these “dire, irreversible results.” Its Net Neutrality Conduct Rules protect against the types of harms the D.C. Circuit identified—including potential injury and death—by prohibiting blocking, throttling, impairing, or otherwise degrading Internet traffic based on its source or content.

The need to prohibit such conduct is not speculative or hypothetical. To the contrary, there is clear evidence that ISPs have taken advantage of the FCC’s termination of federal net neutrality rules to block Internet traffic on discriminatory terms. Just four months ago, an ISP that provides BIAS in northern Idaho and parts

³¹ See S.B. 822, Senate Floor Analysis (Aug. 30, 2018); *supra* note 5.

³² *Mozilla*, 940 F.3d at 59-63.

³³ *Mozilla*, 940 F.3d at 61.

³⁴ *Mozilla*, 940 F.3d at 62.

of Washington State, responding to Twitter’s and Facebook’s bans of former President Trump, announced in an email to customers entitled “Blocking Sites for Censorship” that it would begin blocking all of its customers from Twitter, Facebook, “and any other website that may also be [c]ensuring whether it be through their algorithm they use for their site or any other means.” It offered individual customers the option to opt out of the companywide block.³⁵

As several media outlets accurately reported, the ISP’s behavior did not violate FCC rules, because the FCC had repealed prohibitions on ISP blocking based on Internet traffic’s source or content.³⁶ Only Washington State could challenge the ISP’s policy as unlawful because it had enacted a statewide net neutrality law, akin to S.B. 822, that prohibits this sort of discrimination.³⁷ While news reports of the ISP’s decision to block Facebook and Twitter focused on the political ramifications, public safety also hangs in the balance, because, as described above, social media platforms are now a critical component of local

³⁵ *E.g., Citing ‘censorship’ concerns, Idaho internet provider blocks Facebook, Twitter*, WKRC Local 12 (Jan. 13, 2021), <https://perma.cc/658W-TM7H>; E. Czachor, *Internet Provider to Restrict Access to Facebook, Twitter to Customers Who Request It*, Newsweek (Jan. 11, 2021), <https://perma.cc/PC3D-Q8DV>.

³⁶ *Id.*

³⁷ *Id.*; see Wash. Rev. Code § 19.385.020.

governments' effective and efficient emergency response.³⁸

If an ISP serving Amici's or other California residents were to take the same action, it would not simply hamper public health and safety management—it would functionally prevent local governments from protecting the community. Moreover, if an ISP is willing to block major edge providers like Facebook and Twitter for political reasons, it may well also decide to block communications from local governments themselves or from smaller, niche edge content providers whose blocked traffic would not generate public outcry or resulting market pressure on ISPs to reverse course—but which local governments use for emergency alerts, to communicate with health providers, and for myriad other functions.³⁹ Such blocking could be disastrous to public safety. Yet without S.B. 822's Net Neutrality Conduct Rules, ISPs would be free to do exactly that to Californians. And these practices can have an outsized impact on local government content

³⁸ An ISP's content-based blocking of Facebook, Twitter, and other social media platforms is dangerous enough in normal times. But the public's disconnection from social media, and the Internet more broadly, is even more dangerous in the midst of the COVID-19 pandemic during which people are working, living, and staying socially connected over the Internet.

³⁹ See, e.g., Cty. of Santa Clara, *Catalog of Enterprise Systems published in accordance with California Government Code section 6270.5*, <https://perma.cc/6BLT-PDD2>; City & Cty. of San Francisco, Inventory of citywide enterprise systems of record, <https://data.sfgov.org/City-Management-and-Ethics/Inventory-of-citywide-enterprise-systems-of-record/ebux-gcnq/data> (last accessed May 11, 2021).

providers, which often face situations where immediacy matters, like those faced by first responders, emergency personnel, and the public health community—but do not have the corresponding ability to ensure that their messages are transmitted timely.⁴⁰

The recent ISP blocking incident also reveals that S.B. 822 is correct in its underlying understanding that free-market forces alone do not effectively constrain private-sector ISP behavior in a manner that ensures community members reliable and unimpaired access over the Internet to public safety and health communications from their governments. Indeed, the D.C. Circuit has observed that it is entirely reasonable to expect that, in the absence of regulation, mass-market broadband Internet providers will follow their economic interests—and that the practices prohibited by S.B. 822 are strongly in the providers’ economic interests. *See, e.g., Verizon v. FCC*, 740 F.3d 623, 645-46 (D.C. Cir. 2014) (“Broadband providers also have powerful incentives” to engage in the prohibited practices and “at oral argument Verizon’s counsel announced that ‘but for [the FCC’s Open Internet Order] rules we would be exploring those commercial arrangements.’”); *see generally Telocator Network of Am. v. FCC*, 691 F.2d 525,

⁴⁰ Absent S.B. 822’s Net Neutrality Conduct Rules, ISPs could also demand that local governments pay extraordinary sums for the ISPs not deprioritizing or impairing Internet traffic from public agencies or the edge providers they rely on to communicate with the public. But local governments lack the financial resources to successfully compete for priority.

549 (D.C. Cir. 1982) (“One of the fundamental premises of a regulatory scheme such as that established by the Communications Act is that the free market cannot always be trusted to avoid [actions that are] contrary to the public good.”).⁴¹

CONCLUSION

The harms to the public of enjoining S.B. 822 are not hypothetical or far-off. S.B. 822 provides critical protections without which local governments cannot fulfill their core mission of protecting the public health and safety. Accordingly,

⁴¹ The recent incident of the ISP blocking Facebook and Twitter is certainly not the only example of ISP practices that advance corporate interests at the expense of public safety. Much has already been written about the 2018 episode in which Verizon throttled County Fire’s mobile broadband Internet being used by a unit that was coordinating emergency response among several firefighting agencies combatting the then-largest wildfire in California history, and then refused to stop throttling until County Fire upgraded to a more expensive data plan. *See* Decl. of Fire Chief Anthony Bowden, SER-4-8, at ¶¶ 6-12.

The central relevance of this episode is not to contend that Verizon’s action would have violated the Net Neutrality Conduct Rules or the federal net neutrality rules that were in place until 2017. That question is not at issue in this litigation and implicates fact-specific questions under the reasonable-conduct requirements of S.B. 822 and the former federal net neutrality rules. Instead, the episode’s relevance is that it underscores that Appellants’ contention in this litigation that ISPs will act to protect the public when left unsupervised—which echoes ISPs’ unsuccessful effort to rehabilitate the FCC’s inadequate reasoning before the D.C. Circuit, *see Mozilla*, 940 F.3d at 63—is entirely baseless. In other words, the episode demonstrates that given the opportunity, BIAS providers will choose profits over public safety. That is why it is beside the point that Appellants and their supporting amici argue so vigorously that Verizon’s action was not a net neutrality violation. Appellants’ Br., Dkt. 9, at 62 n.34; Br. of TechFreedom as Amicus Curiae, Dkt. 12, at 8-10; Br. of Chamber of Commerce of the United States of America et al. as Amicus Curiae, Dkt. 13, at 16; Br. of Int’l Ctr. for Law & Economics as Amicus Curiae, Dkt. 15, at 13-14.

both the equities and the public interest lie firmly against an injunction of this important law and the irreparable harms that such an injunction would cause. For the foregoing reasons, Amici Curiae respectfully request that this Court affirm the District Court's order denying Plaintiffs' motion for a preliminary injunction.

DATED: May 11, 2021

Respectfully submitted,

**COUNTY OF SANTA CLARA and
SANTA CLARA COUNTY CENTRAL
FIRE PROTECTION DISTRICT**

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 29(a)(5) because it contains 4,727 words, exclusive of the portions of the brief exempted by Federal Rule of Appellate Procedure 32(f). I certify that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

Dated: May 11, 2021

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CERTIFICATE OF SERVICE

I, Raphael N. Rajendra, hereby certify that I electronically filed this Brief of Amici Curiae County of Santa Clara, California and Six Additional Local Governments in Support of Defendant-Appellee with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 11, 2021. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed May 11, 2021, at Berkeley, California.

/s/ Raphael N. Rajendra